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No. 06-852

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

GABE KERI,

Petitioner,

v.

BOARD OF TRUSTEES OF
PURDUE UNIVERSITY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OF RESPONDENT BOARD OF TRUSTEES OF PURDUE UNIVERSITY

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QUESTION PRESENTED

Petitioner frames four (4) questions in his Petition for Writ of Certiorari. Respondent objects to the consideration of Petitioner's Questions II and IV because Petitioner failed to raise any arguments regarding Respondent's alleged violation of its own policies and procedures or the consideration of "after-acquired evidence" in the proceedings below.

The district court and the court of appeals agreed that Respondent was entitled to the entry of summary judgment on Petitioner's claim of race and national origin discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, because Petitioner failed to establish a *prima facie* case under the standards articulated by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Respondent submits that the question presented is:

Whether Petitioner has presented a compelling reason for this Court's review of the judgment below.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The parties to the proceeding are Petitioner, Dr. Gabe Keri, and Respondent, The Trustees of Purdue University. The Trustees of Purdue University is the body corporate established by the State of Indiana to govern the conduct of students, faculty, employees, and others while upon the property owned, used, or occupied by Purdue University, Indiana's land-grant institution of higher education. *See* IND. CODE § 20-13-1-1-2(a)(2).

The Petition for Writ of Certiorari's caption indicates that there are additional respondents to the Petition. There are not. Petitioner originally filed suit against "John Does 1 through 5," but the district court entered summary judgment on each individual claim, and Petitioner did not appeal the district court's determination in that regard. (Pet. App. at 1a, fn.1).

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
SUMMARY OF REASONS FOR DENYING THE PETITION	1
STATEMENT OF THE CASE	4
I. Statement of Facts	4
II. Course of Proceedings	10
REASONS FOR DENYING THE PETITION	14
I. The Seventh Circuit conducted a proper *de novo* review of the summary judgment record	14
II. The courts below properly applied *McDonnell Douglas*	17
III. Petitioner did not argue that an alleged violation of an internal policy permitted a favorable pretext inference, and the courts below did not resolve that question	21
IV. Respondent did not offer "after-acquired" evidence as support for its decision not to reappoint Petitioner, and the courts below did not consider "after-acquired" evidence in their Title VII analysis	22
CONCLUSION	24

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)..... 15

Bio v. Federal Express Corp., 424 F.3d 593 (7th Cir. 2005)..... 19

Byrd v. Ronayne, 61 F.3d 1026 (1st Cir. 1995) 20

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 15

City of Springfield v. Kibbe, 480 U.S. 257 (1987).....22, 23

Conward v. The Cambridge School Committee, 171 F.3d 12 (1st Cir. 1999).....18, 19

Dandy v. United Parcel Service, 388 F.3d 263 (7th Cir. 2004)..... 19

Graham v. Long Island R.R., 230 F.3d 34 (2d Cir. 2000)..... 19

Hiatt v. Rockwell Intern. Corp., 26 F.3d 761 (7th Cir. 1994)..... 19

McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976).....17, 19

McDonald v. Vill. of Winnetka, 371 F.3d 992 (7th Cir. 2004)..... 19

McDonnell Douglas v. Green, 411 U.S. 792 (1973).....2, 12, 13, 17, 21

McMillian v. Svetanoff, 878 F.2d 186 (7th Cir. 1989)..... 19

Mitchell v. Toledo Hospital, 964 F.2d 577 (6th Cir. 1992)..... 20

Neuren v. Adduci, Mastriani, Meeks & Schill, 43 F.3d 1507 (D.C. Cir. 1995)..... 20

TABLE OF AUTHORITIES – Continued

Page

Patterson v. Avery Dennison Corp., 281 F.3d 676 (7th Cir. 2002) 19

Pennsylvania Dep't. of Corrections v. Yeskey, 524 U.S. 206 (1998) 22, 23

Pivirotto v. Innovative Systems, Inc., 191 F.3d 344 (3d Cir. 1999) 20

Radue v. Kimberly-Clark Corp., 219 F.3d 612 (7th Cir. 2000) 19

Raytheon Co. v. Hernandez, 540 U.S. 44 (2003) 21

Stanback v. Best Diversified Products, Inc., 180 F.3d 903 (8th Cir. 1999) 20

Texas Dept. of Comm. Affairs v. Burdine, 450 U.S. 248 (1981) 17, 21

RULES

FED. R. CIV. P. 15(c) 11

FED. R. CIV. P. 56 2

FED. R. CIV. P. 56(e) 15

SUP. CT. R. 10 1

STATUTES

IND. CODE § 20-13-1-1-2(a)(2) ii

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1981 ..... 10, 11, 13

42 U.S.C. § 1985(3) 3, 10, 11, 13

42 U.S.C. § 1986 ..... 3, 10, 11, 13

42 U.S.C. § 2000e, *et seq.* i

OPINIONS BELOW

Respondent states that Petitioner's citation of the opinions below is accurate, but states that the copies of Petitioner's Petition for Writ of Certiorari that were served upon Respondent did not include a separate reproduction of the Opinion and Order of the district court in an "App. B" as described by Petitioner. The court of appeals' decision, which is reproduced in the Appendix, incorporates the "Opinion and Order" of the district court, in its entirety, beginning at p. 5a of the Appendix and continuing through p. 88a of the Appendix.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 2006. The Petition for Writ of Certiorari was filed on November 12, 2006, and was docketed on December 20, 2006. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

SUMMARY OF REASONS FOR DENYING THE PETITION

Respondent, The Trustees of Purdue University, ("Respondent") respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Seventh Circuit Court of Appeals' opinion affirming the district court's entry of summary judgment in Respondent's favor on Petitioner's Title VII claim of race and/or national origin discrimination. Petitioner has presented no compelling reason for this Court to grant his Petition. SUP. CT. R. 10.

Petitioner argues that the Seventh Circuit and the district court each misapplied the standard of review mandated by FED. R. CIV. P. 56. (Pet. at 9, 10). His argument can fairly be summarized as, "I lost, therefore the courts below misapplied the standard of review." His conclusory argument borders on the frivolous and is manifestly unworthy of this Court's review.

Similarly, Petitioner claims that the courts below misapplied the familiar *McDonnell Douglas* analytical framework when they found that none of Petitioner's seventeen (17) allegedly comparable employees were similarly situated. (Pet. at 15-17). Petitioner claims that the alleged misapplication presents a split among the circuits. (*Id.*). However, he never articulates how the instant case conflicts with cases decided in other circuits. This case is fully consistent with the cases cited by Petitioner, and this question is, again, unworthy of Supreme Court review.

Petitioner's contention that the courts below failed to give the Petitioner the benefit of a favorable pretext inference is not properly before this Court because the courts below held that Petitioner failed to establish a *prima facie* case of discrimination. Resolution of the pretext question is, therefore, unnecessary to sustain the judgment below. Moreover, Petitioner never argued in the proceedings below that an alleged violation of a policy occurred, or that any alleged violation was evidence of pretext. The Petition does not contain any explanation of Petitioner's contention that Respondent violated its internal policies or procedures. Thus, he has waived this Court's consideration of this question.

Petitioner's question regarding the propriety of the consideration of "after-acquired evidence" is also raised for the first time in this Petition. This Court should deem the issue waived by Petitioner because he never argued that the formal internal complaints filed against him were improperly considered by the decision-makers who decided not to reappoint him. Indeed, the evidence is undisputed that the non-reappointment decision was made before any formal internal complaint was lodged against Petitioner. The result of the University's investigation of the formal complaints was that Petitioner was assigned to a 100% research position, and was not permitted to use his University office for the remainder of his employment.

The University's investigation of the formal complaints was considered by the courts below because the Petitioner asked the courts below to consider the investigation. Petitioner's complaint includes allegations that the investigation constituted a conspiracy to deprive him of his civil rights under 42 U.S.C. §§ 1985(3), 1986. (Pet. App. at 51a-52a). Petitioner designated evidence regarding the investigation, and argued that the investigation created a triable issue of fact because the investigator could not substantiate each of the claims filed against Petitioner.

Respondent did not rely upon evidence acquired by the University investigator after the decision to not reappoint Petitioner was made to determine that Petitioner was not meeting Respondent's legitimate employment expectations, and neither court below relied upon "after-acquired" evidence in rendering its judgment.

In sum, Petitioner has plainly failed to carry his burden of demonstrating that there is a compelling reason for this Court to grant the Petition. Petitioner simply

seeks another review of the summary judgment record, which the courts below unanimously found insufficient to establish a *prima facie* case of discrimination. The judgment of the courts below is fully consistent with the precedent of this Court, and with the decisions of the federal circuit courts of appeals. Accordingly, the Petition should be denied.

STATEMENT OF THE CASE

I. Statement of Facts[1]

Petitioner is a former tenure-track Assistant Professor employed by Respondent,[2] in the School of Education at Indiana University Purdue University at Fort Wayne ("IPFW"). (Pet. App. at 2a). Petitioner was employed by Respondent on a series of academic-year appointments, beginning in May, 2000. (Pet. App. at 2a). Petitioner's appointment was reviewed annually by his immediate supervisor, William Utesch ("Utesch"), the Acting Chair of Professional Studies and Director of the School of Education

[1] Petitioner provides the Court with a "Statement of Facts," which he contends are "drawn from the Petitioner's Brief filed on his behalf in the Seventh Circuit Appeal." (Pet. at 2). Petitioner provides no citation (and attaches no support) for any alleged "fact." Respondent's statement of facts relies upon the district court's recitation of undisputed material facts.

[2] The Petition for Writ of Certiorari's caption indicates that there are additional respondents to the Petition. There are not. Petitioner also filed suit against "John Does 1 through 5," but the district court entered summary judgment on each individual claim, and Petitioner did not appeal the district court's determination in that regard. (Pet. App. at 1a, fn.1).

Counseling Program and by Roberta Wiener ("Wiener"), Dean of the School of Education. (Pet. App. at 2a).

Petitioner's performance was reviewed annually. (Pet. App. at 2a). Utesch reviewed materials submitted by Petitioner and evaluated Petitioner by assessing his performance in three (3) areas: teaching, research and service. (Pet. App. at 26a). Satisfactory performance in all three areas assured Petitioner's reappointment for the following academic year. (Pet. App. at 26a-27a). The materials submitted by Petitioner were also reviewed by Wiener, who conducted her own evaluation of Petitioner's record and performance and made her own recommendation regarding reappointment. (Pet. App. at 27a). Wiener's evaluation was conducted with reference to the same criteria (*i.e.* teaching, research and service) as Utesch's evaluation. (Pet. App. at 27a).

Both Utesch's and Wiener's recommendations and the faculty member's materials were then forwarded to the Vice Chancellor of Academic Affairs, Susan Hannah ("Hannah"). (Pet. App. at 27a). Hannah then reviewed the materials and made her own recommendation regarding reappointment, using the same criteria as Wiener and Utesch. (Pet. App. at 27a). Hannah, in turn, forwarded all of the recommendations and the materials submitted by Petitioner to the Chancellor, Michael Wartell ("Wartell"). (Pet. App. at 27a). Wartell then made his final decision based upon his review of the materials, and the recommendations of Utesch, Wiener and Hannah.[3] (Pet. App. at

[3] Petitioner's statement that Wartell makes a "recommendation" for reappointment based upon the recommendations of Utesch, Wiener and Hannah is a misstatement of fact. As Chancellor of IPFW, Wartell's decision is final and is based upon the recommendations of Utesch,

(Continued on following page)

27a). Wartell used the same criteria for evaluation as Utesch, Wiener and Hannah. (Pet. App. at 27a).

Petitioner received satisfactory evaluations and was reappointed for academic year 2001-2002 in January, 2001, about six months after he began working at IPFW. (Pet. App. at 28a). Petitioner was next evaluated eight months later, received a second satisfactory evaluation, and was reappointed for the 2002-2003 academic year. (Pet. App. at 29a).

Beginning in November, 2001, Utesch began receiving student complaints regarding Keri's classroom behavior. (Pet. App. at 30a). Utesch continued to receive complaints from students in both oral and written form throughout the 2002-2003 academic year. (Pet. App. at 32a). From November, 2001 through March, 2003, Utesch received six written complaints, two from students who requested that their identity be protected. (Pet. App. at 33a).

The complaints received by Utesch ranged from a report that Petitioner failed to supervise his practicum students to allegations of inappropriate classroom discussions and included reports of "gay bashing" and "sexual harassment of a student." (Pet. App. at 32a). Utesch met with Petitioner to discuss the student complaints and initially believed that the situation would improve over time. (Pet. App. at 30a-31a).

Petitioner was next evaluated for reappointment beginning in March, 2002. (Pet. App. at 31a). His 2002 evaluation noted that Petitioner responded to student

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Wiener and Hannah, as well as Wartell's own review of the materials. (App. at 17a).

concerns and student feedback, and has sought multiple measures of his teaching to further his growth. (Pet. App. at 31a). Petitioner was reappointed for the 2003-2004 academic year on April 4, 2002. (Pet. App. at 32a).

During the academic year 2002-2003, student complaints against the Petitioner continued and Utesch referred some students to Dean Wiener. (Pet. App. at 33a). In March, 2003, two graduate student employees approached Utesch and reported that Petitioner engaged in inappropriate behavior and had made inappropriate comments to one of them during her interview for a clinic manager position. (Pet. App. at 32a). The inappropriate comments included Petitioner's recommendation that one of the student employees "wear tighter pants." (Pet. App. at 32a). The same student employee also reported that Petitioner told her that "she didn't have big enough boobs because she was white." (Pet. App. at 32a). The inappropriate behavior also included Petitioner's "gay bashing" and disparaging Catholics during classroom lectures. (Pet. App. at 32a). The student employee complaints were consistent with those that Utesch received from other students in other classes taught by Petitioner. (Pet. App. at 32a).

Based on the complaints received by Utesch from a number of students, including the most serious allegations received from the two graduate student employees in spring 2003, Utesch recommended non-reappointment of Petitioner for the 2004-2005 academic year. (Pet. App. at 33a). Utesch concluded that student complaints were becoming more serious and that Utesch's prior meetings with Petitioner did not result in the desired change in behavior. (Pet. App. at 33a). Utesch noted that Petitioner

continued to be productive in research and service, but that his teaching was unsatisfactory. (Pet. App. at 34a).

Wiener also referenced the several student complaints received regarding the Petitioner in her 2003 evaluation of his performance. (Pet. App. at 35a-36a). She noted that Human Resources and the Affirmative Action officer had been notified of this problem. (Pet. App. at 35a-36a). Wiener expressed reservations but recommended Petitioner's reappointment due to his record of productive research and publications, and his verbal commitments to change his teaching deficiencies. (Pet. App. at 36a).

Hannah met with both Wiener and Utesch to discuss their recommendations and reviewed all available documentation. (Pet. App. at 36a). Hannah considered all materials submitted to her by Utesch, Wiener and Petitioner.[4] (Pet. App. at 36a). Hannah recommended non-reappointment on April 3, 2003. (Pet. App. at 36a-37a). Chancellor Wartell concurred with Hannah's recommendation. (Pet. App. at 37a). Petitioner was informed on or about April 3, 2003 that he would not be re-appointed for the 2004-2005 academic year. (Pet. App. at 37a).

Shortly after Petitioner received notice that he had not been recommended for re-appointment, two graduate student employees, Suzanne Swinehart ("Swinehart") and Virginia Hartman ("Hartman") each filed a formal complaint under University procedures,[5] claiming that Petitioner had

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[4] Petitioner's statement that "Dr. Hannah was not willing to look at any documentation Dr. Keri had brought" is a misstatement of the facts in the summary judgment record. (Pet. at 3-4).

[5] Petitioner states that Hartman, Swinehart and Utesch "met and discussed" Dr. Keri at an off-campus racquet club, and that "[s]uch conduct is also contrary to IPFW's policies and procedures." (Pet. at 4).

(Continued on following page)

harassed and discriminated against them in both the classroom and in their work as graduate assistants. (Pet. App. at 39a-40a). Respondent investigated the complaints in accordance with applicable University procedures. (Pet. App. at 40a). Elaine Blakemore ("Blakemore") was assigned to investigate the complaints and interviewed all parties to the complaints, Utesch and two other faculty members in the Department of Education Studies, and thirteen (13) student and former student witnesses from the Counselor Education Program from four different academic "cohorts."[6] (Pet. App. at 40a).

Blakemore issued a detailed, written report with extensive findings on both complaints. (Pet. App. at 40a). She noted that Petitioner was bewildered by all of the allegations against him and that several witnesses were supportive of Petitioner. (Pet. App. at 40a-41a). She also reported that several students supported and corroborated Swinehart and Hartman's complaints. (Pet. App. at 41a-42a).

Blakemore found that Petitioner subjected Hartman to a hostile educational environment and that Petitioner harassed Hartman. (Pet. App. at 42a). Blakemore did not conclude that Petitioner discriminated against Hartman

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Petitioner's allegation is a misstatement of fact to the extent it is read to imply that Hartman, Swinehart and Utesch convened at the racquet club for the purpose of discussing Petitioner. Petitioner's allegation that the meeting "is contrary to IPFW's policies and procedures" is false, and finds no support in the summary judgment record.

[6] A "cohort" is defined as a group of students who begin the program during a given academic year and progress through the program together as a group. Petitioner's statement that the investigator "spoke to a cohort" (*i.e.* a "single" cohort) of current and former students is a misstatement of fact. (Pet. at 4).

on the basis of Hartman's gender, noting that other students, both male and female, were treated similarly by Petitioner. (Pet. App. at 42a). Blakemore ultimately concluded that Swinehart failed to timely file her Complaint, but noted that Swinehart's complaints were consistent with reports of other students whom Blakemore interviewed. (Pet. App. at 42a).

Blakemore recommended that Respondent honor Petitioner's academic year 2003-2004 appointment, but that it remove Petitioner from his teaching and practicum supervision responsibilities. (Pet. App. at 43a). Blakemore presented her report to the University's Committee on Equity, and the Panel concurred with the Blakemore's findings and conclusions. (Pet. App. at 43a). Chancellor Wartell assigned Petitioner to a 100% research position during the 2003-2004 academic year. (Pet. App. at 43a).

II. Course of Proceedings

Petitioner filed an eight-count complaint in the district court, asserting national origin and race discrimination claims under Title VII, a Title VII retaliation claim, claims under 42 U.S.C. §§ 1981, 1985(3) and 1986 and pendent state law claims of intentional and negligent infliction of emotional distress, negligent supervision and common law wrongful termination. (Pet. App. at 5a, 47a). Petitioner alleged that the decision to not reappoint him was discriminatory and/or in retaliation for his reporting alleged discriminatory admission practices by Respondent. (Pet. App. at 5a). He further alleged that Respondent's investigation of Swinehart's and Hartman's internal complaints against him were discriminatory and part of a

conspiracy to smear Petitioner's reputation. (Pet. App. at 6a).

Respondent moved for summary judgment on each of Petitioner's claims, arguing that, as an instrumentality of the State of Indiana, Respondent was immune from liability for damages on Petitioner's claims under 42 U.S.C. §§ 1981, 1985(3) and 1986. (Pet. App. at 48a). Respondent also argued that the claims against Defendants identified only as "John Does 1 through 5," were barred by the statute of limitations, and Petitioner had no right to amend his Complaint, such that the individual claims would relate back under Federal Rule of Civil Procedure 15(c). (Pet. App. at 48a). Finally, Respondent argued that an entity could not conspire with itself, and, therefore, Petitioner's § 1985(3) claim failed, as a matter of law. (Pet. App. at 52a).

Respondent argued that Petitioner failed to establish a *prima facie* case of discrimination or retaliation under Title VII. (Pet. App. at 56a-57a). Specifically, Petitioner was unable to establish that he was meeting his employer's legitimate employment expectations, and could not identify similarly situated comparators who were treated more favorably than he was treated under the same or similar circumstances. (Pet. App. at 60a). Respondent also argued the existence of a legitimate, non-discriminatory reason to not reappoint Petitioner. (Pet. App. at 63a-64a). Finally, Respondent argued that it was entitled to the entry of summary judgment on each of Petitioner's pendent state law claims. (Pet. App. at 75a).

Petitioner responded to Respondent's motion for summary judgment, and argued that he was meeting Respondent's legitimate expectations. (Pet. App. at 64a). Petitioner

also identified seventeen (17) allegedly comparable employees. (Pet. App. at 61a). Finally, he submitted that Respondent's legitimate, non-discriminatory reason for his non-reappointment was pretextual because the allegations of his inappropriate behavior and ineffective teaching had no basis in fact.[7] (Pet. App. at 64a).

Respondent replied to Petitioner's brief in opposition and moved to strike several exhibits designated as "evidence" in support thereof.[8] Petitioner opposed Respondent's Motion to Strike, and Respondent replied to Petitioner's opposition. The district court struck fifteen (15) of the seventeen (17) challenged statements, and Petitioner appealed nine (9) of these rulings. The Seventh Circuit upheld each evidentiary ruling, and Petitioner does not seek review of these decisions in his Petition. (Pet. App. 11a-23a).

The district court entered summary judgment on each of Petitioner's claims against the Respondent. (Pet. App. at 48a). Using the analytical framework articulated by this Court in *McDonnell Douglas,* the district court concluded that Petitioner failed to establish the existence of a *prima*

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[7] Petitioner never argued that Respondent improperly considered "after-acquired evidence," or that the Respondent violated its policies and procedures such that the Court should find a reasonable juror could infer that its stated reasons for non-reappointment were pre-textual. Respondent submits that Petitioner has, therefore, waived the review of these questions in this Court.

[8] For example, Respondent moved to strike the deposition testimony of Josue Njock Libii, including his testimony that Utesch "berated" Dr. Keri with inappropriate comments about minorities. That testimony was stricken by the District Court, and Petitioner did not appeal this ruling. (Pet. App. at 19a-21a). Petitioner's reliance on the stricken testimony in his Petition for Writ of Certiorari is improper. (Pet. at 3).

facie case of discrimination. (Pet. App. at 57a-63a). Specifically, the district court found that Petitioner failed to establish the existence of similarly situated comparators, and further failed to establish that he was meeting Respondent's legitimate employment expectations. (Pet. App. at 63a-64a, 73a-75a). The district court further found that Respondent offered a legitimate, non-discriminatory reason for not reappointing Petitioner, and that Petitioner failed to establish that the reason was pretextual. (Pet. App. at 75a).

Petitioner appealed the district court's entry of summary judgment on his claims under 42 U.S.C. §§ 1981, 1985(3) and 1986, as well as his Title VII discrimination claim and three of his four pendent state claims. Petitioner did not appeal the entry of summary judgment on his Title VII retaliation claim or his common law wrongful discharge claim. (Pet. at 1-20).

The Seventh Circuit Court of Appeals affirmed the district court in all respects, and adopted the "excellent opinion of the district court." (Pet. App. at 4a). The Seventh Circuit expressly noted that Petitioner "had failed to establish his prima facie case." (Pet. App. at 3a) (citing *McDonnell Douglas v. Green*, 411 U.S. 792, 802-04 (1973). The court of appeals noted that "there was a lack of evidence that [Petitioner] was meeting the legitimate expectations of his employer." (Pet. App. at 3a). The court of appeals further agreed that the summary judgment record lacked evidence of similarly situated employees who were treated more favorably. (*Id.*).

The appellate court recognized that Petitioner identified seventeen (17) allegedly comparable employees but noted that the record established that many of them were

"subject to a separate and entirely different means of oversight, making them dissimilarly situated." (Pet. App. at 4a). Regarding the remainder of the allegedly comparable employees, the Seventh Circuit noted that "there was no evidence whatsoever that the remaining employees were supervised by Utesch or had ever stood accused of the same or similar conduct as [Petitioner]." (Pet. App. at 4a). Finally, the Seventh Circuit noted that Petitioner "failed to explain when and how the non-tenured employees were treated more favorably than he." (Pet. App. at 4a).

REASONS FOR DENYING THE PETITION

I. The Seventh Circuit conducted a proper *de novo* review of the summary judgment record.

Petitioner argues that the Seventh Circuit "misapplied the standard of review dictated by the Supreme Court" because it "did not weigh all of the evidence and considered only the evidence favoring the District Court's findings." (Pet. at 8). Essentially, Petitioner argues that he designated some evidence, and the Seventh Circuit affirmed the entry of summary judgment. Thus, Petitioner argues that the Seventh Circuit misapplied the standard of review. Petitioner's argument regarding a purported "misapplication" of the standard of review amounts to nothing more than question-begging, and offers no compelling reason for this Court's review.

Petitioner's contention that the courts below "took all of Respondent's assertions as factual and clearly appear to draw all reasonable inferences adversely to Petitioner" is demonstrably false. (Pet. at 10). Each court concluded that

Petitioner failed to establish two essential elements of his *prima facie* case. (Pet. App. at 3a, 36a, 38a). Each court found that Petitioner failed to carry his burden of establishing the existence of similarly situated employees. (Pet. App. at 4a, 36a). Each court found that Petitioner failed to establish that he was meeting Respondent's legitimate employment expectations for employees. (Pet. App. at 4a, 38a).

The Seventh Circuit plainly conducted a *de novo* review in this case. It studied the evidence, and concluded that Petitioner simply failed to carry his burden of establishing a *prima facie* case of discrimination. FED. R. CIV. P. 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Although the moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact, there is no requirement that the movant negate his opponent's claim. *Celotex Corp.*, 477 U.S. at 323. Once the moving party has met its initial burden, the nonmovant may not rest on conclusory allegations but instead must come forward with evidence demonstrating the existence of each element of its case upon which it would bear the burden of proof at trial. FED. R. CIV. P. 56(e). Evidence which is merely colorable or not significantly probative cannot defeat summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986).

Petitioner's allegation that the Seventh Circuit failed to conduct an appropriate review is wrong. That court reviewed Petitioner's evidence regarding the existence of seventeen (17) allegedly similar employees. It noted that the district court "thoroughly and carefully analyzed all the issues raised in this appeal" and adopted the district court's order. (Pet. App. at 4a). The district court reviewed this evidence and concluded that "the similarities of which

[Petitioner] speaks relate only to his ability to teach, write, and research. The [Petitioner] has not shown similarities as to the status of these individuals or any detrimental conduct, similar to his own, that they were accused of." (Pet. App. at 35a). The district court carefully compared each of the seventeen current and former employees to Petitioner and concluded that none were comparable to Petitioner. (Pet. App. at 36a).

The appellate panel unanimously agreed with the district court's assessment of the evidence, noting that:

> [W]hile [Petitioner] points to 17 current and former members of the faculty as similarly situated, many of them were tenured professors. Due to their tenure, they were subject to a separate and entirely different means of oversight, making them dissimilarly situated. In other words, there was no evidence they were subject to the same standards for promotion and tenure as [Petitioner], nor was there any evidence the tenured professors were supervised by the same individuals. As for the remaining employees, there was simply too little evidence regarding their respective situations. For example, there was no evidence whatsoever the remaining employees were supervised by Utesch or had ever stood accused of the same or similar conduct as [Petitioner's]. Finally, [Petitioner] failed to explain when and how the non-tenured employees were treated more favorably than he.

(Pet. App. at 4a).

The appellate court conducted a proper *de novo* review in this case. The mere fact that it adopted the "thorough and careful" analysis of the district court does not indicate otherwise. Petitioner's bald statement that he "presented

abundant evidence, which raised numerous issues of material fact, that the Court of Appeals did not consider in the course of its *de novo* review," (Pet. at 10) is demonstrably false, and utterly unworthy of this Court's review.

II. The courts below properly applied *McDonnell Douglas*.

Petitioner argues that the courts below erred in concluding that Petitioner failed to establish the existence of similarly situated employees who were treated more favorably under the same or similar circumstances. (Pet. at 16). He contends that this failure creates a conflict among the circuits, and is contrary to this Court's precedent as articulated in *McDonnell Douglas* and *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976). (Pet. at 16). Specifically, Petitioner claims that the "Seventh Circuit misapplied the appropriate standard" articulated by those cases by "holding that there was no evidence that other employees were accused of the same or similar conduct" as Petitioner was accused of (*i.e.* ineffective teaching and inappropriate classroom behavior). (Pet. at 16). Petitioner carries the burden of establishing the existence of similarly situated comparators. *McDonnell Douglas v. Green*, 411 U.S. 792, 804 (1973); *see also Texas Dept. of Comm. Affairs v. Burdine*, 450 U.S. 248, 258-59 ("*McDonnell Douglas* teaches that it is the plaintiff's task to demonstrate that similarly situated employees were not treated equally.").

Petitioner feebly claims that the judgment below creates a conflict between the Seventh Circuit and the

First Circuit.[9] He claims that the First Circuit does not require that a plaintiff establish that allegedly comparable employees were accused of the same or similar conduct. He cites *Conward v. The Cambridge School Committee*, 171 F.3d 12 (1st Cir. 1999), as support for this argument.

Conward is not different from this case. It held that a Title VII plaintiff failed to establish the existence of similarly situated employees. *Id.* at 22. For example, the court noted that a white teacher accused of shoving a student was not comparable to an African-American teacher accused of sexual harassment. *Id.* at 21 ("The improper use of physical force, on one hand, and sexual harassment, on the other hand, are qualitatively different infractions.") The First Circuit noted that "in terms of comparative evidence, similarity, rather than identicality, provides the essential requirement for an analogy." *Id.* at 21-22. Still, the court found that the evidence offered by the plaintiff for comparison failed the test because he could not establish that others had been charged with the same or similar conduct. *Id.* at 22.

Petitioner's Title VII claim failed for the same reason in the proceedings below. Both courts concluded that Petitioner failed to establish that any of his proffered comparators were charged with the same or similar conduct as Petitioner. (Pet. App. at 4a). For example, he claimed that a faculty member was accused of plagiarism, but was retained by the University. (Pet. App. at 63a). The courts below each found plagiarism is not the same, or

[9] Petitioner actually claims that the judgment below conflicts with eight (8) other circuits. Respondent is unsure of Petitioner's basis for this allegation because he cites to only a single case from the First Circuit.

even arguably similar, to harassment, and that Petitioner failed to carry his burden of establishing the existence of a similarly situated employee who was treated more favorably than he was treated under the same or similar circumstances. (Pet. App. at 60a).

Just like the First Circuit in *Conward*, the Seventh Circuit holds that in order for a plaintiff to establish the existence of a similarly situated employee or "comparator," the plaintiff must show that both employees were subjected to the same standards, had the same supervisor, and engaged in similar conduct. *Bio v. Federal Express Corp.*, 424 F.3d 593, 597 (7th Cir. 2005); *McDonald v. Vill. of Winnetka*, 371 F.3d 992, 1002-03 (7th Cir. 2004) (citing *Radue v. Kimberly-Clark Corp.*, 219 F.3d 612, 617 (7th Cir. 2000)). To successfully establish a comparator, the plaintiff must show that there is someone who is directly comparable to him in all material respects. *Patterson v. Avery Dennison Corp.*, 281 F.3d 676, 680 (7th Cir. 2002). A plaintiff's subjective beliefs alone cannot create triable issues of fact to preclude summary judgment. *See McMillian v. Svetanoff*, 878 F.2d 186, 190 (7th Cir. 1989); *see also Dandy v. United Parcel Service*, 388 F.3d 263, 273 (7th Cir. 2004) and *Hiatt v. Rockwell Intern. Corp.*, 26 F.3d 761, 771 (7th Cir. 1994).

The foregoing standards are fully consistent with the standards for similarity articulated by this Court. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 274 (1976) (holding that decision to terminate employees who were charged with the same crime was a legitimate decision, but the criterion "must be 'applied alike to members of all races'"). The standards applied in this case are in harmony with other judicial circuits. *Graham v. Long Island R.R.*, 230 F.3d 34, 39 (2d Cir. 2000) (confirming that a Title

VII plaintiff must establish the existence of comparators who are similar in all material respects); *Pivirotto v. Innovative Systems, Inc.*, 191 F.3d 344, 359 (3d Cir. 1999) (holding that a similarity analysis should focus upon performance criteria and qualifications identified by the employer as its reasons for the adverse action); *Stanback v. Best Diversified Products, Inc.*, 180 F.3d 903, 910 (8th Cir. 1999) (when "different decision-makers are involved two decisions are rarely similarly situated in all relevant respects"); *Byrd v. Ronayne*, 61 F.3d 1026, 1033 (1st Cir. 1995) (noting that comparators must establish similarity of performance, qualifications and conduct); *Neuren v. Adduci, Mastriani, Meeks & Schill*, 43 F.3d 1507, 1514 (D.C. Cir. 1995) (similarity means that all of the relevant aspects of the employment situation were nearly identical); *Mitchell v. Toledo Hospital*, 964 F.2d 577, 593 (6th Cir. 1992) (holding that similarity required the plaintiff to establish that he had the same supervisor, was subject to the same standards and exhibited the same conduct as the putative comparators).

Consistent with the foregoing standards, the courts below found that Petitioner's proffered comparators were different in three (3) material ways. First, Petitioner and the majority of the alleged comparators were not subject to the same standards for continued employment. (Pet. App. at 4a, 35a). Second, Petitioner and the majority of his proffered comparators did not report to the same supervisors. (Pet. App. at 4a, 35a). Third, there was no evidence that any of the proffered comparators were accused of even arguably similar conduct to Petitioner. (Pet. App. at 4a, 35a). Moreover, the Seventh Circuit noted that Petitioner "failed to explain when and how the non-tenured employees were treated more favorably than he." (Pet. App. at 4a).

The standards articulated in the Seventh Circuit were properly applied in this case. The judgment in this case is fully consistent with the precedent of this court. The proceedings below do not create a circuit split. This Court should deny the Petition.

III. Petitioner did not argue that an alleged violation of an internal policy permitted a favorable pretext inference, and the courts below did not resolve that question.

Petitioner devotes a good deal of his Petition to the question of whether he was entitled to a pretext inference based on his allegation that Respondent violated its internal policies and procedures. This question is not properly before this Court. First, as shown above, the courts below each concluded that Petitioner failed to establish a *prima facie* case of discrimination. (Pet. App. at 3a, 57a-63a). This conclusion requires the entry of summary judgment in Respondent's favor on Petitioner's Title VII claim. *McDonnell Douglas*, 450 U.S. at 802; *see also Burdine*, 450 U.S. at 254 n.7 (the phrase *prima facie case*, as used in *McDonnell Douglas* means "the establishment of a legally mandatory, rebuttable presumption"). Petitioner's inability to establish a *prima facie* case renders the *McDonnell Douglas* burden shift and pretext analysis unnecessary. *Raytheon Co. v. Hernandez*, 540 U.S. 44, 50 n.3 (2003); *McDonnell Douglas*, 450 U.S. at 802.

Moreover, Petitioner never argued below that an alleged violation of an internal policy created an inference that Respondent's reasons for not reappointing Petitioner (*i.e.* his ineffective teaching and inappropriate behavior) were pretextual. As the district court noted, in response to Respondent's legitimate, non-discriminatory reason for its

decision, Petitioner "offer[ed] a two-paragraph rebuttal insisting that [Respondent's] stated reasons have no basis in fact." (Pet. App. at 64a). The district court found that Petitioner "failed to present enough evidence to cast the shadow of pretext on the [Respondent's] explanation why he was not reappointed." (Pet. App. at 64a).

Petitioner did not argue that a violation of a policy permitted a pretext inference, and neither court below addressed this question. Therefore, this Court should decline to review the question in this case. *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212-13 (1998) ("'Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.'") (citations omitted); *City of Springfield v. Kibbe*, 480 U.S. 257, 258 (1987) ("[w]e ordinarily will not decide questions not raised or litigated in the lower courts").

Petitioner has presented no compelling reason for this Court to review the question of whether a violation of an internal policy creates a pretext inference. The Petitioner's failure to establish a *prima facie* case renders the pretext question unnecessary to sustain the judgments below. Moreover, the courts below did not address the question of an alleged policy violation because Petitioner did not make this argument in the proceedings below. Therefore, the question is not properly before this court.

IV. Respondent did not offer "after-acquired" evidence as support for its decision not to reappoint Petitioner, and the courts below did not consider "after-acquired" evidence in their Title VII analysis.

Petitioner correctly states that "Respondent's ultimate decision not to reappoint Petitioner was final prior" to the

filing of formal complaints of harassment against Petitioner by two graduate student employees.[10] (Pet. at 17). He claims the judgment below conflicts with precedent of this Court, and with the rulings of other federal circuits to the extent that the courts relied upon "after-acquired" evidence to support the entry of summary judgment. This question amounts to nothing more than a red herring, and this Court should not grant the Petition to review this issue.

Respondent did not rely upon evidence acquired after its decision not to reappoint Petitioner to support that decision. Rather, Respondent established that complaints received by Utesch and Wiener over two academic years prior to the decision proved Petitioner's failure to meet legitimate employment expectations. (Pet. App. at 30a-34a). Because Respondent offered no such evidence, neither court below addressed the issue of "after-acquired" evidence. Thus, this Court should not address the question of "after-acquired" evidence in this case. *Yeskey*, 524 U.S. at 212-13 (1998); *Kibbe*, 480 U.S. at 258.

Evidence of the University's investigation of the formal complaints were before the courts below because Petitioner claimed that the University's investigation evinced a conspiracy to deprive him of his civil rights, and because Petitioner claimed that the investigation established that Respondent negligently supervised and trained its employees, a claim sounding in tort under Indiana's common law. (Pet. App. at 30a-32a, 46a). Petitioner raised

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[10] His claim that both formal complaints were untimely is false. (Pet. App. at 18). Only Swinehart's complaint was filed after the 120-day time period expired. (*Id.*).

the issue in his Complaint, and never moved to strike or otherwise limit the Court's review of the evidence regarding the University's investigation. Most important, Petitioner simply has no basis to argue to this Court that either court below impermissibly relied upon "after-acquired" evidence.

Petitioner's fourth question is not properly before this Court. The Court should deny the Petition.

CONCLUSION

Petitioner has not established any compelling reason for the court to grant his Petition. Therefore, Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

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